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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1171046

Greenway Health, LLC, and Greenway EHS, Inc.

v.

Southeast Alabama Rural Health Associates

1171061

Sunrise Technology Consultants, LLC, and Lee Investment
Consultants, LLC

v.

Southeast Alabama Rural Health Associates

Appeals from Pike Circuit Court
(CV-17-900018)

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BOLIN, Justice.

Greenway Health, LLC, and Greenway EHS, Inc. (formerly EHS, Inc.) (hereinafter referred to collectively as "the Greenway defendants"), and Sunrise Technology Consultants, LLC, and Lee Investment Consultants, LLC (hereinafter referred to collectively as "the Sunrise defendants"), appeal separately from the Pike Circuit Court's order denying their motion to compel the arbitration of certain claims asserted against them by Southeast Alabama Rural Health Associates ("SARHA").

Facts and Procedural History

The Greenway defendants specialize in practice-management software for the medical industry. SARHA is a private nonprofit corporation that provides medical services to the residents of rural southeast Alabama. SARHA operates 10 facilities across southeast Alabama and provides medical care to approximately 70,000 patients. SARHA alleged in its complaint that, since 2009, all of its patient records -- including contact information, billing information, and treatment records -- had been housed in its medical-records database. SARHA is required by federal law to maintain

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electronically medical records for each patient receiving health-care services eligible for reimbursement under a federally funded program. SARHA is further required to provide adequate safeguards against the loss, destruction, or unauthorized use of patient medical records pursuant to Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Those requirements include a data backup plan with procedures to create and maintain retrievable copies of all electronically protected health information and a disaster-recovery plan to restore any loss of data that may occur.

1. SARHA's Relationship with the Greenway Defendants

On March 18, 2008, SARHA entered into a master license agreement with EHS, Inc., an Alabama corporation, in which SARHA obtained a nonexclusive and nontransferable right to install and use electronic medical-records software for the management of SARHA's patient records ("the license agreement"). The license agreement expressly states that it "sets forth the terms and conditions under which the parties agree that [SARHA] may ... obtain licenses to use EHS['s] proprietary software" (EHS's proprietary software is hereinafter referred to as "the software"). Section 1 of the

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license agreement, entitled "License Grant and Right of Use," provides that EHS grants SARHA a nonexclusive and nontransferable license to install the software. Section 1 also prohibits SARHA from applying any procedure or process to the software to ascertain any source code or any trade-secret information or process contained in the software.

Section 3 of the license agreement, entitled "Maintenance, Support and Other Services," provides that EHS shall provide SARHA with certain maintenance and support services relating to the software, including updates to the software, Web-based support consisting of information on the current software, telephone support in the form of advice and counsel regarding SARHA's use of the software, and training and consulting services for SARHA's employees relating to the use and operation of the software.

Section 9(a) of the license agreement contains the following arbitration agreement:

"Arbitration. Except for actions to protect Proprietary Rights and to enforce an arbitrator's decision hereunder, all disputes, controversies, or claims arising out of or relating to this Agreement or a breach thereof shall be submitted to and finally resolved by arbitration under the rules of the American Arbitration Association ('AAA') then in effect. There shall be one arbitrator, and such

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arbitrator shall be chosen by mutual agreement of the parties in accordance with AAA rules. The arbitration shall take place in Birmingham, Alabama, if proceedings are initiated by Licensee, and in Licensee's choice of venue, if initiated by EHS. The arbitrator shall apply the laws of the State of Alabama to all issues in dispute. The findings of the arbitrator shall be final and binding on the parties, and may be entered in any court of competent jurisdiction for enforcement. Legal fees shall be awarded to the party prevailing in the arbitration."

On July 25, 2013, EHS was acquired by Greenway Health and became a wholly owned subsidiary of Greenway Health. Subsequently, EHS was renamed Greenway EHS, Inc.

Both SARHA and the Greenway defendants have certain obligations under the United States Department of Health and Human Services ("HHS") privacy and security rules set forth at 45 C.F.R. parts 160 and 164, implementing HIPAA. Those privacy and security rules require health-care providers to "ensure the confidentiality, integrity, and availability of all electronic protected health information the covered entity or business associate creates, receives, maintains, or transmits" and to "protect against any reasonably anticipated threats or hazards to the security or integrity of such information." 45 C.F.R. § 164.306(a)(1) and (2). In an effort to meet their HIPAA obligations, SARHA and the Greenway

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defendants, in 2014, entered into a business associate agreement ("BAA") for the express purpose of setting forth the "terms and conditions pursuant to which Protected Health Information^[1] that is received from, or received, maintained, created, or transmitted on behalf of, [SARHA] by [the Greenway defendants] will be handled between themselves and third parties."

Section 3.1 of the BAA sets forth the Greenway defendants' responsibilities regarding the protected health information. Section 3.1(a) requires the Greenway defendants, when providing services to SARHA, to "comply with the requirements of the Privacy rule that apply to [SARHA] in the performance of those obligations." Section 3.1(b) of the BAA requires the Greenway defendants to "implement and use appropriate administrative, physical, and technical safeguards and ... comply with applicable Security Rule requirements with

¹The BAA adopts the definition of "protected health information" promulgated under 45 C.F.R. § 160.103, which includes "individually identifiable health information" maintained electronically and "is limited to the Protected Health Information received from, or received or created on behalf of [SARHA] by [the Greenway defendants] pursuant to performance of the Services" provided for in the BAA. Protected health information includes both medical and billing records. See 45 C.F.R. § 164.501.

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respect to Electronic Protected Health Information to prevent use or disclosure of Protected Health Information other than as provided for by this Agreement." Section 3.1(c) requires the Greenway defendants to notify SARHA of (1) any use and/or disclosure of protected health information not permitted by the BAA or (2) any security incident the Greenwood defendants become aware of. Section 3.1(d) requires the Greenwood defendants to notify SARHA, without unreasonable delay, of any breach of protected health information. Section 3.1(h) of the BAA requires the Greenway defendants to, "within fifteen (15) days of receiving a written request from [SARHA], make available (in accordance with the requirements of 45 C.F.R. § 164.524) Protected Health Information necessary for [SARHA] to respond to individuals' requests for access to Protected Health Information about them."

Section 3.2 sets forth the Greenway defendants' responsibilities with respect to privacy of and safeguards for financial data and requires the Greenway defendants to, among other things, implement proper administrative, technical, and physical safeguards designed to ensure the security and confidentiality of the protected health information.

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The BAA also addresses dispute resolution. Section 5.8 of the BAA provides that, "[i]f any controversy, dispute or claim arises between the Parties with respect to this Agreement, the Parties shall make good faith efforts to resolve such matters informally." Finally, section 5.1 of the BAA provides:

"Entire Agreement. This Agreement, and all attachments, schedules and exhibits hereto, constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersedes any prior or contemporaneous written or oral memoranda, negotiations, arrangements, contracts, or understandings of any nature or kind between the Parties with respect to the subject matter hereof."

2. SARHA's Relationship with the Sunrise Defendants

The Sunrise defendants specialize in providing technical computer-hardware installation, service, and maintenance. In August 2008, SARHA entered into a service agreement with the Sunrise defendants for the installation and maintenance of the computer servers and hardware necessary to "run" the software. In October 2010, SARHA and the Sunrise defendants entered into a second service agreement whereby the parties agreed that Sunrise Technology would continue to provide services to SARHA consisting of support and maintenance of SARHA's information-

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technology infrastructure, servers, and personal-computer workstations. In January 2014, SARHA and the Sunrise defendants entered into a BAA in which the Sunrise defendants agreed to, among other things, "implement Administrative, Physical, and Technical Safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the Electronic Protected Health Information." Neither the service agreements nor the BAA entered into between SARHA and the Sunrise defendants contained an arbitration provision.

Although the BAA did not contain an arbitration provision, it did contain a jurisdiction provision, which provides:

"This agreement shall be deemed executed in the State of Alabama, U.S.A., and is to be governed and construed by Alabama law, without regard to its choice of law provisions. The parties agree that jurisdiction and venue for any action to enforce this Agreement are properly in the applicable federal or state courts encompassing Barbour, Coffee, Crenshaw, Dale, Geneva, Henry, Houston and Pike Counties, Alabama."

3. SARHA's Claims

SARHA states that, after the BAAs were executed, the Greenway defendants and the Sunrise defendants were directly

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involved in monitoring, maintaining, and supporting SARHA's computer servers and database. However, between May 2016 and August 2016, SARHA's primary and secondary hard-disc drives in the servers containing protected health information for SARHA's patients failed. SARHA was unable to access any of its patients' medical information, including scheduling information, medical-record histories, and patient billing information. SARHA asserts that it requested that the Greenway defendants and the Sunrise defendants restore the medical information and that the Greenway defendants and the Sunrise defendants have been unable to do so. SARHA states that the Greenway defendants and the Sunrise defendants have disclosed that they do not have a viable backup of the database that would allow the database be restored and the medical information recovered.

On January 25, 2017, SARHA sued the Greenway defendants and the Sunrise defendants (hereinafter referred to collectively as "the defendants") asserting, in part:

"Count One - Fraudulent Misrepresentation

". . . .

"Defendants represented to SARHA that the software, hardware, and services designed, provided

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monitored, and maintained by them would properly store, protect and preserve SARHA's data, including its electronically stored patient medical records. Defendants further represented that the system contained redundancies and back-ups of the database that prevent a loss of electronically stored data as a result of an event such as a server crash.

"Those representations were false. Contrary to these representations, the server crashed and there is no viable backup of the information such that SARHA now has no access to any of its electronically stored information, including its patients' medical records for the last 6 years.

". . . .

"Count Two - Fraudulent Suppression

"Defendants owed a duty to SARHA to disclose information relating to problems with and necessary practices for the performance, storage, protection and back-up of SARHA's electronically stored information.

"Defendants suppressed material facts from SARHA, including the Defendants' knowledge that the server was not operating properly, that electronic information was not properly backed-up, that the back-ups were not taken offsite on routine basis, and that there were issues with hardware and software backup that were known in the months leading up to catastrophic failure that were never addressed or resolved.

". . . .

"Count Three - Negligence and Wantonness

". . . .

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"Defendants owed a duty of reasonable care to SARHA.

"Through the actions and inaction described herein, including the failure to properly design, monitor, service and maintain SARHA's server and database, the failure to properly preserve and protect backups of the database, and the failure to inform SARHA of these issues prior to the server crash, Defendants breached their duties owed to SARHA.

". . . .

"Count Four - Breach of Contract

". . . .

"Defendants owed contractual obligations to SARHA to properly protect and preserve the electronically stored medical record information.

"Through the actions and inaction described herein, Defendants caused or allowed the electronically stored medical records to be permanently irretrievable, which is a breach of their contractual obligations.

". . . .

"Count Five - Declaratory Judgment

"Defendants owed to SARHA an obligation to maintain, protect and preserve the electronically stored medical records belonging to SARHA's patients and stored on SARHA's server. These duties were imposed upon Defendants by contract and operation of law.

"Defendants have failed to honor their legal and contractual obligations. As a result, SARHA is now exposed to potential liability to its patients,

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regulatory bodies and third parties based upon Defendants' actions or inactions on its behalf.

"As a result of the Defendants' actions or inactions, SARHA is entitled to contractual and/or common law indemnification for any damages that it may incur as a result of claims and regulatory actions against it, including fines, sanctions, damages, attorney's fees, interest and costs."

On March 3, 2017, the Greenway defendants moved the trial court to stay the proceedings and to compel arbitration pursuant to the arbitration provision contained in the license agreement, arguing that all of SARHA's claims "arise out of or relate to" the license agreement. On March 7, 2017, the Sunrise defendants joined the Greenway defendants' motion to stay and to compel arbitration arguing that, although the BAA the Sunrise defendants entered into with SARHA did not contain an arbitration provision, "because [SARHA's] claims against the Greenway defendants and the Sunrise defendants, as a matter of law, are 'intertwining' and the claims against the Greenway defendants must be arbitrated, SARHA is estopped from contesting the Sunrise defendants' standing to compel arbitration."

On May 16, 2017, SARHA filed a motion in opposition to the motion to compel arbitration, arguing that its claims

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against the Greenway defendants arise from the BAA, which does not contain an arbitration provision and which, by its express terms, supersedes the license agreement, upon which the Greenway defendants rely. Also on May 16, 2017, SARHA filed a motion in opposition to the Sunrise defendants' motion to join the Greenway defendants' motion to compel arbitration, again arguing that SARHA's claims against the Greenway defendants arise from the BAA, which does not contain an arbitration provision and which supersedes the license agreement, upon which the Greenway defendants rely. SARHA further argued that the claims asserted against the Sunrise defendants are not the type claims that require arbitration by estoppel and that the Sunrise defendants entered into their own contract with SARHA, which did not contain an arbitration provision.

On July 7, 2018, the trial court entered an order denying the Greenway defendants' and the Sunrise defendants' motion to stay the proceedings and to compel arbitration. This appeal followed.

Standard of Review

"Our standard of review of a ruling denying a motion to compel arbitration is well settled:

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""This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (opinion on application for rehearing).""

"Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000))."

SSC Montgomery Cedar Crest Operating Co. v. Bolding, 130 So. 3d 1194, 1196 (Ala. 2013).

Discussion

The Greenway Defendants (case no. 1171046)

The Greenway defendants argue on appeal that the trial court erred in denying their motion to compel arbitration because, they say, they met their initial burden of proving the existence of a contract calling for arbitration of SARHA's

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claims and that that contract affects interstate commerce. The Greenway defendants supported their motion to compel arbitration with the license agreement, which was executed in 2008. The Greenway defendants argue that all of SARHA's claims arise from the license agreement and that the arbitration provision contained in the license agreement is applicable to all of SARHA's claims.

SARHA responds by arguing that it cannot be compelled to arbitrate the claims asserted against the Greenway defendants because, it says, the BAA entered into between SARHA and the Greenway defendants in 2014 -- which did not contain an arbitration provision -- is the applicable contract between them because, SARHA alleges, it expressly supersedes the license agreement. Thus, SARHA contends that the Greenway defendants have failed to establish the existence of a contract containing an arbitration clause.

It is well established that ""[a]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."" Custom Performance, Inc. v. Dawson, 57 So. 3d 90, 97 (Ala. 2010) (quoting Central Reserve Life Ins. Co. v. Fox,

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869 So. 2d 1124, 1127 (Ala. 2003), quoting in turn AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986), quoting in turn United Steeleworkers of America v. Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

The license agreement, relied upon by the Greenway defendants in their motion to compel arbitration, granted SARHA a "nonexclusive" and "nontransferable" right to use the software for the management of SARHA's patient records. The license agreement expressly states that its purpose was to set forth the "terms and conditions under which the parties agree that [SARHA] may ... obtain licenses to use EHS['s] proprietary software." The license agreement is completely silent regarding any obligation on behalf of the Greenway defendants to maintain and protect a patient's protected health information.

On the other hand, the BAA entered into between SARHA and the Greenway defendants in 2014 specifically addresses the parties HIPAA obligations as they relate to the maintenance and protection of protected health information that the Greenway defendants "create[], receive[], maintain[], or transmit[]" on behalf of SARHA. The BAA recites that its

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express purpose is to set forth the "terms and conditions pursuant to which Protected Health Information that is received from, or received, maintained, created, or transmitted on behalf of, [SARHA] by [the Greenway defendants] will be handled between themselves and third parties." The provisions contained in Section 3 of the BAA set forth above all address the responsibilities and obligations of the Greenway defendants as they pertain to the maintenance and protection of the protected health information. Specifically, Section 3.1(b) requires the Greenway defendants to "implement and use appropriate administrative, physical, and technical safeguards and ... [to] comply with applicable Security Rule requirements with respect to Electronic Protected Health Information to prevent use or disclosure of Protected Health Information other than as provided for by this Agreement."

Each of the claims asserted by SARHA arises from the alleged failure of the primary and secondary hard-disc drives in the servers maintained by the Greenway defendants that contained the protected health information of SARHA's patients. SARHA alleges that the failure of SARHA's computer system prevented SARHA from being able to access any of its

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patients' medical information, including scheduling information, medical-record histories, and patient-billing information. SARHA further asserts that, when it requested that the Greenway defendants and the Sunrise defendants restore the medical information, the Greenway defendants and the Sunrise defendants disclosed that they did not have a viable backup of the database that would allow the database to be restored and the medical information recovered.

Thus, it is clear from the express language of the BAA that it was intended by the parties to govern the Greenway defendants' obligations to maintain and to protect the protected health information of SARHA's patients. Because SARHA's claims arise from the Greenway defendants' alleged failure to properly maintain and protect the protected health information and because the BAA expressly covers the subject of maintaining and protecting the protected health information, we conclude that the BAA governs SARHA's claims in this case.

The BAA does not contain an arbitration provision. Rather, it provides that, "[i]f any controversy, dispute or claim arises between the Parties with respect to this

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Agreement, the Parties shall make good faith efforts to resolve such matters informally." Further, the BAA contains an "entire agreement" clause, which provides that the BAA "constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersedes any prior ... written ... contracts ... of any nature or kind between the Parties." "[I]f in its terms a contract is plain and free from ambiguity, then there is no room for construction and it is the duty of the court to enforce it as written." Ex parte Conference America, Inc., 713 So. 2d 953, 956 (Ala. 1998) (quoting Ex parte South Carolina Ins. Co., 683 So. 2d 987, 989 (Ala. 1996)).

In Ex parte Conference America, this Court applied the plain-meaning interpretation of an "entire-agreement" clause to determine whether the parties had agreed to arbitrate certain claims. In that case the parties had entered into an initial contract that contained an arbitration provision. Subsequently, the parties entered into a second contract that was separate and apart from the first contract and that did not contain an arbitration provision. The second contract did, however, contain an entire-agreement clause. When a dispute

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arose between the parties, the trial court granted a motion compelling the parties to arbitrate the claims between them. This Court issued a writ of mandamus ordering the trial court to vacate its order compelling arbitration, stating:

"In Crown Pontiac, Inc. v. McCarrell, 695 So. 2d 615, 618 (Ala. 1997), this Court refused to enforce an arbitration clause that was included in a preliminary handwritten 'buyer's order form' contract, because the final contract expressly excluded consideration of all terms not set forth in that contract. This Court held that the final contract constituted the entire agreement between the parties. Id.; accord, e.g., Lakehead Pipe Line Co. v. Investment Advisors, Inc., 900 F. Supp. 234, 236 (D. Minn. 1995) (recognizing that arbitration clause in first contract was negated by 'entire agreement' clause of the second contract with respect to claims arising out of the second contract). Thus, the 'entire agreement' clause in the April Contract negated the effect of the arbitration clause in the February Contract with respect to claims arising out of the April Contract.

"[The parties] did not agree to arbitrate claims arising out of the April Contract. They did not include an arbitration clause in the April Contract. They did not expressly or by implication incorporate the February Contract and its arbitration clause into the April Contract. See Ben Cheeseman Realty Co. v. Thompson, 216 Ala. 9, 12, 112 So. 151, 153 (1927) (stating that where a contract contains references to other documents, those documents are incorporated into the contract). Instead, the parties agreed that the April Contract, in which they included no arbitration clause, was the 'entire agreement.' Therefore, the trial court erred in ordering arbitration of Conference America's claims regarding the implementation of the Plans."

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Ex parte Conference America, 713 So. 2d at 956.

The BAA governs the dispute between SARHA and the Greenway defendants because SARHA's claims arise out of the subject matter of the BAA, i.e., the Greenway defendants' obligations to maintain and protect the protected health information of SARHA's patients. The parties to the BAA have not agreed to arbitrate the claims arising out of the BAA, because the BAA does not contain an arbitration provision. The parties to the BAA have not expressly or by implication chosen to incorporate into the BAA the arbitration provision included in the license agreement. In fact, they have expressly excluded the application of the license agreement as it pertains to the subject matter of the BAA. Accordingly, we conclude that SARHA cannot be compelled to arbitrate its claims against the Greenway defendants because the Greenway defendants have failed to establish the existence of a contract calling for arbitration. See Bolding, supra.

The Sunrise Defendants (case no. 1171061)

The Sunrise defendants adopt by reference the arguments of the Greenway defendants. The Sunrise defendants contend that, under the intertwining-claims doctrine, a nonsignatory

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to an arbitration agreement may compel a signatory to arbitrate the claims "'where the arbitrable and nonarbitrable claims are so closely related that the party to a controversy subject to arbitration is equitably stopped to deny the arbitrability of the related claim.'" Custom Performance, Inc. v. Dawson, 57 So. 3d at 99 (quoting Conseco Fin. Corp. v. Sharman, 828 So. 2d 890, 893 (Ala. 2001)). The Sunrise defendants argue that SARHA's claims against the Greenway defendants and the Sunrise defendants are "intertwined" and that, therefore, SARHA is estopped from contesting the Sunrise defendants' standing to compel arbitration. See ECS, Inc. v. Goff Grp., Inc., 880 So. 2d 1140 (Ala. 2003).

Because we have determined that the Greenway defendants have failed to establish the existence of a contract containing an arbitration provision, the Sunrise defendants' argument based on an intertwining-claims theory must fail.

Conclusion

Based on the forgoing, we affirm the trial court's denial of the Greenway defendants' and the Sunrise defendants' motion to stay the proceedings and to compel arbitration.

1171046 -- AFFIRMED.

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1171061 -- AFFIRMED.

Parker, C.J., and Wise, Sellers, and Stewart, JJ.,
concur.